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Nos. 85-1892, 85-1901, 85-1902 and 85-1949

In the Supreme Court of the United States

OCTOBER TERM, 1986

DONALD J. PAONE, PETITIONER

v.

UNITED STATES OF AMERICA

SAMUEL RUSSOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

RENE PICCARRETO, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD J. MARINO AND JOSEPH R. ROSSI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES IN OPPOSITION

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The seventh question presented in this case is whether consecutive sentences may be imposed for convictions under the Racketeer Influenced and Corrupt Organizations Act (RICO) substantive and conspiracy provisions, 18 U.S.C. 1962(c) and (d). Petitioners Marino and Rossi (85-1949 Pet. 25-27) ask the Court to review that question,

relying on a conflict between the Sixth Circuit's decision in *United States* v. *Sutton*, 642 F.2d 1001 (1980) (en banc), cert. denied, 453 U.S. 912 (1981)—holding that consecutive sentences may not be imposed—and the uniformly contrary decisions of the other courts of appeals. The Sixth Circuit in *Sutton* reasoned that because the same evidence at trial supported both the RICO substantive and conspiracy convictions, the convictions must be merged for purposes of sentencing. In our brief in opposition in this case (Br. 25-27), we contended that the Court need not resolve the conflict among the circuits on this question. We observed (Br. 27) that, in light of subsequent developments, the Sixth Circuit might reconsider its decision in the *Sutton* case.*

On January 23, 1987, the Sixth Circuit decided *United States* v. *Callanan*, No. 86-1140, in which the court abandoned the rationale of its decision in the *Sutton* case. In *Callanan* the court of appeals held that concurrent sentences may be imposed for convictions under the RICO substantive and conspiracy provisions. The court observed (slip op. 2) that this question turns on whether "Congress intended a defendant's conduct to be punishable under both provisions." Consistent with the analysis applied by all of the other circuits that have addressed the issue (see Br. 26), the court of appeals first considered (slip op. 2-3) whether, under this Court's decision in *Blockburger* v. *United States*, 284 U.S. 299 (1932), the substantive and conspiracy offenses each required proof of a fact that the other did not. The court answered this question affirmatively (slip op. 3). The court next reviewed (*id.* at 3-6) the legislative history of the RICO provisions, discerning in that history "Congress'

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*Our opening brief in opposition in this case also responded to the petition of Thomas E. Marotta, No. 85-1883. On October 14, 1986, the Court denied certiorari as to petitioner Marotta. We have, accordingly, deleted his name from the caption in this brief.

intent to allow punishment under both §§ 1962(c) and 1962(d)" (*id.* at 5). The court expressly rejected (*id.* at 6-7) the argument—crucial to its earlier holding in *Sutton*—that because the proof at the trial in this case had been the same for both offenses, there could not be separate punishments. "[T]he relevant inquiry," the court held (*ibid.*), "examines the proof necessary to establish the statutory elements."

To be sure, the *Callanan* case by its terms resolved only the availability of *concurrent* sentences for RICO conspiracy and substantive convictions. But in deciding that question the court of appeals made clear that its reasoning applies equally to the question of consecutive sentences. The court cited (slip op. 4-5) *United States* v. *Sutton*, 700 F.2d 1078 (6th Cir. 1983) (*Sutton II*), and *United States* v. *Rone*, 598 F.2d 564 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980), for the proposition that consecutive sentences may be imposed for a RICO charge and a predicate offense. The court concluded (slip op. 5) that under its analysis in the present case "Congress' express purposes in enacting RICO suggest the same conclusion * * * concerning conspiracy to violate and actual violation of RICO proscriptions."

The *Callanan* case thus represents a rejection of *Sutton* by the Sixth Circuit, in favor of the contrary analysis applied by the other courts of appeals. Accordingly, there is no longer any real conflict among the circuits on the seventh question presented.

For the reasons set forth in this supplemental brief and in our main brief in opposition, the petitions for a writ of certiorari should be denied.

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Solicitor General

FEBRUARY 1987